

Arbitration Law Review

Volume 5 *Yearbook on Arbitration and Mediation*

Article 6

2013

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Recommended Citation

Maureen A. Weston, *The Accidental Preemption Statute: The Federal Arbitration Act and Displacement of Agency Regulation*, 5 *Y.B. Arb. & Mediation* 59 (2013).

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THE ACCIDENTAL PREEMPTION STATUTE: THE FEDERAL ARBITRATION ACT AND DISPLACEMENT OF AGENCY REGULATION

Maureen A. Weston*

The Yearbook on Arbitration and Mediation's 2013 Symposium focused on the role of the courts and judicial review in arbitration and mediation. Considering this question, this Article examines the command of the Federal Arbitration Act (FAA) for courts to enforce private agreements to arbitrate and to confirm arbitral awards as judgments subject to limited grounds for vacatur, as the public judicial system is invoked to revere private arbitration agreements and awards—at times at the expense of significant public policy challenges and the displacement of agency regulatory procedures specifically designed to address public policy concerns.

In a series of decisions, the United States' Supreme Court (U.S. Supreme Court) has declared the FAA as establishing a national policy favoring arbitration and emphatically declared that Section 2 of the FAA, which simply provides for the judicial enforcement of arbitration agreements, preempts state law rules that directly conflict with the FAA, single out or discriminate against arbitration, or otherwise “stand as an obstacle to the accomplishment of the FAA's objectives.” The U.S. Supreme Court's expansive interpretation of the FAA has resulted in the preemption of state legislative, judicial, and administrative laws, as well as the encroachment on federal legislative and administrative regulatory schemes. The judicial system, as mandated by U.S. Supreme Court decisions, has applied the FAA so expansively as to favor arbitration beyond the congressional intent. In short, the courts are used to elevate private arbitration contracts above state and even federal laws and administrative schemes specifically enacted for addressing public policy concerns. Although a patchwork of industry-specific legislative proposals have been promulgated in reaction, seeking to “reverse” FAA over-preemption, important statutory and administrative schemes are at risk of displacement by this general command to enforce private contracts under the Court's standard of FAA preemption. As an alternative to the multitude of specialized legislative responses seeking to restore regulatory authority, Congress must amend the FAA to explicitly define the statute's intended reach and reverse the Court's preemption trend.

I. INTRODUCTION

“[W]hen parties agree to arbitrate all questions arising under a contract, the [Federal Arbitration Act] supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative.”¹

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¹ Preston v. Ferrer, 552 U.S. 346, 359 (2008).

The U.S. Supreme Court has emphatically declared that Section 2 of the Federal Arbitration Act (FAA), which simply provides for the judicial enforcement of arbitration agreements, preempts state law rules that directly conflict with the FAA, that single out or discriminate against arbitration, or that otherwise “stand as an obstacle to the accomplishment of the FAA’s objectives.”² *Southland v. Keating*,³ the 1984 foundational case for the Court’s vast preemption doctrine, has been regarded even by members of the Court as wrongly decided but “workable.”⁴ The text of the 1925 law states nothing about preemption, and Congress unlikely intended to displace entire bodies of state and federal regulatory laws. In fact, the FAA explicitly states that the enforceability of arbitration agreements is subject to the “[g]rounds as exist at law . . . for the revocation of any contract.”⁵ Among these laws of general applicability are state contract law defenses, including public policy, unconscionability, fraud and duress. Despite these limiting parameters, the FAA has operated to invalidate numerous state laws and administrative schemes.

The Court’s 2011 decision in *AT&T v. Concepcion*—that the FAA preempts a state law invalidating consumer arbitration contracts that ban class actions as unconscionable—has had a far wider impact than crippling collective action.⁶ Suggesting that the FAA preempts state administrative agency proceedings, the Supreme Court vacated and remanded for consideration “in light of *AT&T*” the California Supreme Court’s ruling in *Sonic-Calabasas A, Inc. v. Moreno*⁷ that an employee subject to an arbitration agreement could pursue rights under the state labor code seeking assistance from the Labor Commissioner in wage dispute cases.⁸ The specter of the FAA’s preemption threatens to undermine state, as well as federal, regulatory and protective administrative schemes. Increasingly, the FAA preemption doctrine is “unworkable” and unnecessarily constrains states’ ability to implement public policy.⁹

² *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011).

³ See *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (holding that § 2 applied in state and federal courts, and as such, “withdr[aws] the power of the state to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.” Thus, the FAA preempted the California state law that required judicial recourse for franchise claims.).

⁴ *Allied Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 284 (1995) (O’Connor, J., dissenting) (stating that although wrong, *Southland* has not proved unworkable, and, as always, “Congress remains free to alter what we have done. Today’s decision caps this Court’s effort to expand the FAA.”).

⁵ 9 U.S.C. §2 (2006).

⁶ See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). After *AT&T*, courts have cited the decision as binding upon the decision to enforce class action waivers, resulting in the elimination of numerous class action claims. See Maureen A. Weston, *Death of Class Arbitration After Concepcion*, 60 U. KAN. L. REV. 767, 782 (2012) (citing the “rubber-stamp” effect of *AT&T* and following decisions).

⁷ *Sonic-Calabasas A, Inc. v. Moreno*, 132 S. Ct. 496 (2011).

⁸ *Id.* at 496.

⁹ A number of scholars contend that *Southland* was wrongly decided. See David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 LAW. & CONTEMP. PROBS. 5, 6 (2004) (noting that “no member of the *Southland* majority remained on the Court as of 1994, and five current members of the Court have at one time or another dissented from *Southland*. . . .”); David S. Schwartz, *The Federal Arbitration Act and the Power of Congress Over State Courts*, 83 OR. L. REV. 541, 541-42 (2004) (asserting that “[t]he Federal Arbitration Act is unconstitutional as applied to the states—and no one has noticed . . . FAA preemption is nothing more or less than procedural regulation of state courts, and . . . Congress lacks the power to regulate procedures in state courts.”).

This Article examines the impact of the U.S. Supreme Court's expansive interpretation of the FAA, which has resulted in the preemption of legislative, judicial, and administrative laws and regulatory schemes. Section II briefly describes key FAA provisions addressing judicial enforcement and review of arbitration as well as the congressional purpose underlying the FAA. Section III analyzes the impact of the Supreme Court's FAA preemption doctrine, specifically as it impacts state and federal administrative regulatory schemes. Section IV considers the patchwork of industry-specific legislative, regulatory responses seeking to "reverse" FAA preemption. The Article concludes by proposing, as an alternative to the multitude of specialized legislative responses seeking to return regulatory authority, that Congress amend the FAA to explicitly define the statute's intended reach, and restore authority to the states, the province of local governance.

II. FAA JUDICIAL ENFORCEMENT AND VACATUR

In 1925, Congress enacted the FAA in order to ensure that agreements to arbitrate disputes would be enforceable on the same basis as other contracts.¹⁰ The Act was needed to reverse the then judicial hostility towards arbitration agreements, which courts, in 1925, had regarded suspiciously as 'ousting' the court of its jurisdiction. Business and trade associations had urged Congress to pass the FAA to establish a procedure in federal courts for the enforcement of arbitration agreements, as provisions in business contracts, and of arbitral awards so that parties could resolve their disputes expeditiously and finally.¹¹ Thus, in Section 2 of the FAA, Congress provided that:

A written provision in . . . a contract evidencing a transaction *involving commerce* to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.¹²

¹⁰ See 9 U.S.C. §9 (2006). See also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) ("[The FAA's] purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.").

¹¹ See Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 102–12 (2006) (describing the historical context of the FAA's enactment and arguing that "[t]he purpose of the Arbitration Act was primarily to make arbitration agreements enforceable in federal court and secondly to provide procedures that would make this enforcement process simple and expeditious, thereby enabling merchants to resolve their disputes more cheaply and easily."). See also 9 U.S.C. §3 (2006) (providing that "[i]f any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration . . . the court . . . shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement. . ."). See also Thomas V. Burch, *Regulating Mandatory Arbitration*, 2011 UTAH L. REV. 1309, 1316–1320 (2011) (describing the Congressional purpose of the FAA).

¹² 9 U.S.C. §2 (2006) (emphasis added). The Supreme Court has since ruled the FAA's enforcement provisions apply in state as well as federal court. *Southland Corp. v. Keating*, 465 U.S.1, 10 (1984).

While FAA Section 2 provides for the enforcement of agreements to arbitrate, Section 10 of the statute operates to ensure the finality of arbitral awards by authorizing limited grounds upon which a court may review or vacate an arbitral award, for reasons such as fraud or undue means, an arbitrator's evident partiality or misconduct in the proceedings, or where an arbitrator acts in excess of his or her authority.¹³ These grounds are significantly "[n]arrower than the standards for appellate review in a judicial case where a court reviews a lower court's legal rulings de novo and factual findings for clear error."¹⁴

In *Hall Street Associates, L.L.C. v. Mattel, Inc.*,¹⁵ the U.S. Supreme Court held that Section 10 of the FAA provided the exclusive grounds for judicial vacatur and modification of arbitral awards covered under the Act.¹⁶ The Court rejected the contention that the FAA's requirement to enforce arbitration contracts as written permits private parties to contract to expand the scope of judicial review beyond the grounds enumerated in the FAA.¹⁷ While *Hall Street* seemingly resolved the question regarding the ability of private parties to expand the scope of judicial review of arbitral awards, the Court alluded to the possibility of "other possible avenues" for judicial review of arbitration awards.¹⁸ Causing confusion, the Court avoided discussing the continued viability of judicially recognized standards of review such as "manifest disregard of the law" or the availability of state law for expanded judicial review; and whether state courts are bound to apply the restrictive interpretations of Sections 9 and 10 of the FAA.¹⁹ Accordingly, the circuit courts of appeals have divided.²⁰

Whether courts may continue to review arbitral awards on grounds beyond those set forth in Section 10 or through judicially recognized standards for manifest disregard of the law or violation of public policy, the bar to vacate an arbitration award remains high. Indeed, petitions for vacatur of arbitral awards rarely prevail.²¹ Arbitration awards

¹³ 9 U.S.C. §10(a) (2006) ("In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made . . .").

¹⁴ Maureen A. Weston, *The Other Avenues of Hall Street and Prospects for Judicial Review of Arbitral Awards*, 14 LEWIS & CLARK L. REV. 929, 933–34 (2010) [hereinafter Weston, *The Other Avenues of Hall Street*] (citing *Hicks v. Cadle Co.*, 355 F. App'x 186 (10th Cir. 2009)).

¹⁵ *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008).

¹⁶ *Id.* at 592 ("The FAA confines its expedited judicial review to the grounds listed in 9 U.S.C. §§ 10 and 11.").

¹⁷ Weston, *The Other Avenues of Hall Street*, *supra* note 14, at 932.

¹⁸ *Hall St. Assocs., LLC*, 552 U.S. at 590.

¹⁹ *Id.*

²⁰ See *Abbott v. Law Office of Patrick Mulligan*, 440 Fed. App'x 612, 618-19 (10th Cir. 2011) (summarizing circuit split regarding the continued viability of "manifest disregard of the law" as grounds for vacatur). Some courts consider that manifest disregard is subsumed within the Section 10 categories as part of exceeding authority, while other courts consider the judicially recognized standard to stand alone.

²¹ J. Lani Bader, Thomas Brewer, Lawrence Mills & Peggy J. Williams, *Vacating Arbitration Awards*, 11 DISP. RESOL. MAG 23, 25 (2005) (reporting that of the 182 state and federal court cases between

are virtually unreviewable on the merits and are rarely vacated. Those making judicial challenges to arbitration awards face a “high risk of sanctions” for frivolous appeals.²² Perhaps this result effectuates the FAA’s purpose and the parties’ agreement to submit disputes to arbitration. Finality is regarded as a primary benefit of arbitration and that is, after all, what parties presumably agreed to secure. Yet each year scores of petitions are filed seeking vacatur. Very few are successful. For the most part, once in arbitration, parties are locked into the system of limited judicial review, arbitral immunity, and finality.²³ It would thus seem incumbent to ensure that parties enter into arbitration knowingly and voluntarily. Further, the arbitration process is presumed to simply provide ‘another forum,’ but parties are still to be able to vindicate their legal rights in that system.²⁴

Here’s the rub. The only significant judicial vacatur occurring is through the preemption of judicial rulings, state laws, and in some cases, federal laws that are deemed rarely in direct conflict with arbitration, but merely “anti-arbitration.”²⁵ In the same year that *Hall Street* was decided, the Court announced in *Preston v. Ferrer*, that “[w]hen parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative.”²⁶ That decision received far less attention than *Hall Street*, but the impact of *Preston* is arguably far more reaching, if not encroaching, upon public governance than the private conduct limited in *Hall Street*.²⁷ While the courts largely stay away from reviewing arbitral awards, courts are called to be actively involved in enforcing agreements to arbitrate, even when such action involves displacing procedures under state and federal laws.

January 1, 2004 and October 31, 2004 in which a motion to vacate an arbitration award was filed, 37 (20%) of them were vacated and 145 (80%) were confirmed. The authors reported that the frequency of successful vacatur applications was significantly higher in state court cases 31 (25.8%), compared to 6 (9.7%) of the federal cases studied. Of the vacated state court cases, 71% were decided in either New York, California, Connecticut, or Massachusetts. The grounds asserted for seeking vacatur included that the arbitrators had “exceeded their powers” was the most successful grounds claimed, succeeding approximately 20% of the time. Conversely, manifest disregard for the law, though second most frequently advanced, had the lowest vacatur success rate of all rationales studied, succeeding only 4% of the time.). More recent empirical data conducted since the 2004 study can be found at http://millsadr.com/wp-content/uploads/2011/04/When_Arbitrators_Exceed_Their_Powers_April_2009.pdf.

²² See *Johnson Controls, Inc. v. Edman Controls, Inc.*, Nos. 12-2308 & 12-2623 (7th Cir., March 18, 2013) (denying sanctions only because the contract’s loser-pay provision was enforced, and reminding litigants that “challenges to commercial arbitral awards bear a high risk of sanctions.” Moreover, “[a]ttempts to obtain judicial review of an arbitrator’s decision undermine the integrity of the arbitral process. Because of Johnson’s appeal, Edman has been deprived not only of the value of the distributorship it expected to have for Panama, but also part of the value of the arbitration to which both parties agreed.”).

²³ See, e.g., Maureen A. Weston, *Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration*, 88 MINN. L. REV. 449 (2004)

²⁴ See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (citation omitted).

²⁵ See Ian D. Mitchell & Richard A. Bales, *Concepcion and Preemption Under the Federal Arbitration Act*, 4 PENN ST. Y.B. ARB. & MEDIATION 9 (2012).

²⁶ *Preston v. Ferrer*, 552 U.S. 346, 359 (2008).

²⁷ See also *Perry v. Thomas*, 482 U.S. 483, 491 (1987) (holding that the FAA preempted California statute that required administrative adjudication of wage claims prior to arbitration).

III. FAA PREEMPTION AND IMPACT ON ADMINISTRATIVE PROCEEDINGS

The FAA, the authority for which agreements to arbitrate are enforced and which makes arbitral awards virtually final, has become the basis to preempt the operation of state and potentially even federal laws, threatening to displace the ability of state courts or legislatures to govern or exercise the federalism principles of the Tenth Amendment. Under the Supremacy Clause of the U.S. Constitution, federal law preempts, and thus invalidates, conflicting state law. The FAA does not contain an express preemption clause, and the historical background of Section 2 suggests that Congress intended only to ensure the enforcement of commercial parties' agreements to arbitrate.²⁸ Nonetheless, the U.S. Supreme Court has on numerous occasions ruled that the FAA preempts state laws that not only attempt to regulate agreements to arbitrate or the arbitration process, but also laws of general applicability that may affect arbitration.²⁹

A. *FAA Implied Preemption Doctrine*

The U.S. Supreme Court has ruled that the FAA applies in state and federal court and preempts conflicting state law, citing the Act's jurisdictional basis under the Commerce Clause.³⁰ As such, the Court in *Southland v. Keating* held that the FAA "withdr[aws] the power of the state to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."³¹ Thus, the FAA preempted the California state law that required judicial recourse for franchise claims. Lacking an express preemptive intent, FAA preemption is implied based on the broadest form of "conflict preemption," which generally warrants narrow construction. Since *Southland*, the preemption doctrine has become an oft-used mechanism for the Supreme Court to overturn state legislation that not only invalidate arbitration agreements or single out arbitration agreements for different treatment than other contracts, but increasingly to overturn state laws deemed as "hostile" towards arbitration.³²

²⁸ See 9 U.S.C. §2 (2006).

²⁹ See, e.g., *Allied Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (interstate commerce); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 56 (1995) (FAA preemption of state law requiring judicial resolution of claims involving punitive damages); *Perry v. Thomas*, 482 U.S. 483, 491 (1987) (FAA preemption of state-law requiring judicial forum for wage disputes); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (FAA preemption of state statute's requiring judicial forum for franchisee disputes).

³⁰ The proposition that the FAA is more than a procedural statute and applies in state courts has been the subject of much criticism, including by Justices Scalia, Thomas, and O'Connor, because the express language of § 4 directs a U.S. district court to compel arbitration of a valid arbitration agreement. 9 U.S.C. § 4 (2006). Yet, based on *stare decisis*, the FAA preemptive effect has been accepted and enforced in numerous arbitration cases. See, e.g., *Allied Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995).

³¹ *Southland Corp.*, 465 U.S. at 10 (1984) (held that § 2 applied in state and federal courts, and as such, "withdr[aws] the power of the state to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."). Thus, the FAA preempted the California state law that required judicial recourse for franchise claims.

³² See *Mitchell & Bales*, *supra* note 25; W. Mark Weidemaier, *The Federal Arbitration Act: Federal Preemption of State Law Regulating Arbitration*, ADMINISTRATION OF JUSTICE (Nov. 2005), available at <http://sogpubs.unc.edu/electronicversions/pdfs/aojb0505.pdf>.

B. Arbitration and Administrative Procedures

The vast preemptive effect accorded to the FAA poses a risk to deny access to, and the operation of, administrative agency procedures specifically established to handle certain claims. The parties in *Preston* were subject to the California Talent Agent Act (TAA), which provided exclusive jurisdiction to the Labor Commissioner to decide disputes involving agent fee claims against performers but also provided for *de novo* review to the district court.³³ The Court ruled that the administrative scheme would likely postpone arbitration and thus conflicted with the FAA. Rejecting that the TAA merely required an exhaustion of administrative remedies, the Court stated that the FAA overrides “not only state statutes that refer certain state-law controversies initially to a judicial forum, but also state statutes that refer certain disputes initially to an administrative agency.”³⁴ Is the Court correct with its pronouncement that “[w]hen parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative?”³⁵ Moreover, is the general rule to exhaust administrative remedies an obstacle to arbitration, thereby requiring FAA preemption?³⁶

Despite *Preston*’s pronouncement that the FAA preemption includes administrative schemes that may delay arbitration, in 2011, the California Supreme Court in *Sonic-Calabasas A, Inc., v. Frank Moreno*,³⁷ held that an employee could pursue his wage claim for unpaid vacation pay under the state administrative proceeding as a prerequisite to arbitration. The California Labor Code codifies a statutory procedure where an employee may either sue for nonpayment of wages or file a complaint with the Labor Commissioner, who has the option to sue itself on the worker’s behalf in an administrative “Berman” hearing.³⁸ A decision from the administrative hearing may be appealed *de novo* in the trial court, but an employer must post bond. A successful employee is entitled to attorney’s fees, and the Labor Commissioner represents employees.

In *Sonic*, Frank Moreno signed a document which required binding arbitration under the FAA as a condition of employment. Moreno later filed an administrative wage claim pursuant to the Labor Code. Sonic sought to compel arbitration, arguing that the employee had waived his rights under the state administrative scheme. The California Supreme Court held that the attempted waiver of the employee’s right to a Berman hearing was invalid as unconscionably contrary to public policy favoring the prompt payment of wages. Further, the right to the administrative hearing was not preempted by the FAA, as it does not preclude arbitration but simply affects the timing. The binding contractual arbitration clause was a valid alternative to the *de novo* appeal of the administrative wage award. The California Supreme Court interpreted *Preston* to involve the question of whether the Labor Commissioner or arbitrator would initially decide the Talent Agency Act question (a question of primary jurisdiction); whereas, this case

³³ *Preston v. Ferrer*, 552 U.S. 346, 354 (2008).

³⁴ *Id.* at 349.

³⁵ *Id.* at 359.

³⁶ *See id.*

³⁷ *See Sonic-Calabasas A, Inc. v. Moreno*, 51 Cal. 4th 659 (2011).

³⁸ *Id.* at 672 (“The Berman hearing procedure is designed to provide a speedy, informal, and affordable method of resolving wage claims.”) (quoting *Cuadra v. Millan*, 17 Cal. 4th 855, 858 (1998)).

challenged the arbitration clause itself. The court likened the Labor Commissioner's role in this case to that of an agency recognized in *EEOC v. Waffle House, Inc.*, "not as adjudicator but as prosecutor, pursuing an enforcement action in its own name or reviewing a discrimination charge to determine whether to initiate judicial proceedings."³⁹ *Waffle House*⁴⁰ held that a mandatory arbitration clause in the employment contract did not bar the Equal Employment Opportunity Commission from pursuing victim-specific remedies for discrimination, such as back-pay, reinstatement, and damages, in an American with Disabilities Act (ADA) enforcement action.⁴¹ It recognized that while the FAA does favor arbitration, the ADA authorizes pursuit of remedies, and the arbitration clause does not bind anyone other than parties to the clause. Similarly, the Labor Code in *Sonic* required the Labor Commissioner to act on an employee's behalf in an appeal of the administrative decision.

Like the *Sonic* court, other courts have been hesitant to find a state administrative scheme in conflict with or displaced by the FAA. In addition to the policy favoring arbitration, the court in *Mid-Atlantic Toyota Distributors, Inc. v. Charles A. Bott, Inc.*,⁴² recognized that "[t]here also exists in the courts a long-standing public policy of hesitancy to interfere with administrative proceedings before all administrative remedies have been exhausted."⁴³ The case involved a claim of unfair termination of an automobile dealership. Under state law, the State Board of Vehicle Manufacturers, Dealers and Salespersons had jurisdiction to hear such complaints. The court noted that such an administrative tribunal was specifically established to deal with such claims and the concern of the *Southland* Court, to prevent forum shopping, was wholly inapplicable. Further, the court stated that while the FAA requires a stay of judicial proceedings where one party moves to compel arbitration, it does not specify a stay of administrative proceedings. It added, "[i]nterpreting *Southland* as extending to claims brought in administrative tribunals as well as in state and federal courts would result in the FAA being more preemptive of state law than if we interpret the holding of *Southland* narrowly. Preemption is not favored unless compelled by explicit congressional intent."⁴⁴

C. Impact of *AT&T v. Concepcion* on Administrative Proceedings

Two months after the decision in *Sonic*, the U.S. Supreme Court issued *AT&T Mobility LLC v. Concepcion*, holding that the FAA preempted the state court's ruling deeming class action waivers unconscionable, because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress [in the FAA]"⁴⁵ The *AT&T* decision triggered substantial controversy in its apparent

³⁹ *Sonic* 51 Cal. 4th at 691.

⁴⁰ *Equal Emp't Opportunity Comm'n v. Waffle House Inc.*, 534 U.S. 279 (2002).

⁴¹ *Id.* at 298.

⁴² *Mid-Atlantic Toyota Distribs., Inc. v. Charles A. Bott, Inc.*, 515 A.2d 633 (Pa. Commw. Ct. 1986).

⁴³ *Id.* at 636.

⁴⁴ *Id.* at 637 (noting that the Court ultimately interpreted that the parties' arbitration agreement was worded too narrowly and that the dispute was not covered by the FAA.).

⁴⁵ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).

acceptance that the FAA authorizes private parties, by the strike of a pen, to eviscerate class actions in court or in arbitration. Its preemptive effect has rippled even farther.⁴⁶

After *AT&T*, the U.S. Supreme Court granted certiorari in *Sonic*, summarily vacated the judgment and remanded the case back to the California Supreme Court, to consider in light of the *AT&T* ruling, whether the state administrative wage proceedings are inconsistent with the FAA. While *Sonic* remains pending at the time of this writing, the remand certainly signals that the FAA could displace state administrative procedures, such as those accorded under the Labor Code.⁴⁷

FAA preemption may also affect federal agency adjudication and rulemaking. The Financial Industry Regulatory Authority (FINRA) is charged with regulating the securities markets and broker dealings. Under FINRA rules, class action waivers are prohibited.⁴⁸ In *Charles Schwab & Co. Inc. v. FINRA*,⁴⁹ Schwab & Co. sought to enjoin application of the FINRA rule, in an effort to enforce class action waivers in Schwab customer account contracts, arguing that the FAA preempts the FINRA rule under *AT&T Mobility, LLC v. Concepcion*.⁵⁰ The district court dismissed this case because of the duty to exhaust administrative remedies, as a jurisdictional prerequisite, noting the benefits of this process included “the expertise and intimate familiarity with complex securities operations which members of the industry can bring to bear on regulatory problems, and the informality of self-regulatory procedures.”⁵¹ The FINRA Panel thereafter concluded, in FINRA’s disciplinary action against Schwab, that Schwab’s contractual class waiver provisions violate and conflict with FINRA rules preserving judicial class actions.⁵² Nonetheless, it determined the FINRA rule could not be enforced due to the interpretation of the FAA under *AT&T*, as “[r]ules that override an agreement to arbitrate and allow a party to an arbitration agreement to avoid arbitration represent the kind of ‘hostility’ to arbitration the Supreme Court has repeatedly found inappropriate and unenforceable under the FAA.”⁵³ The Panel considered the Supreme Court’s FAA decisions “to mean that countervailing policy concerns that might counsel against arbitration of a particular kind of dispute – whether state or federal, statutory or regulatory – cannot override the

⁴⁶ Courts could be potentially eliminated from the arbitration process altogether, other than at the judicial review stage, by a delegation provision. See *Rent-A-Center West, Inc. v. Jackson*, 120 S. Ct. 2772 (2010) (ruling 5-4, that where an arbitration provision delegates gateway questions concerning the validity and enforceability of the arbitration agreement (arbitrability) to arbitrators, unconscionability challenges must be directed to the delegation provision alone). Cf. *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008) (holding that parties cannot by private contract agree to expand the scope of judicial review under the FAA).

⁴⁷ *Sonic* was set for oral argument before the California Supreme Court on April 3, 2013, suggesting that the Court came to a tentative ruling. *Oral Argument Calendar Los Angeles Session April 3 and 4, 2013*, SUPREME COURT OF CALIFORNIA, <http://www.courts.ca.gov/documents/sapr13.pdf>.

⁴⁸ *Charles Schwab & Co. Inc. v. Fin. Indust. Regulatory Auth.*, 861 F. Supp. 2d 1063 (N.D. Cal. 2012) (describing FINRA Rule 2268(d) preventing pre-dispute arbitration agreements that bar rights a party would have in a judicial forum).

⁴⁹ *Id.*

⁵⁰ *Id.* at 1064.

⁵¹ *Id.*

⁵² *Dept. of Enforcement v. Charles Schwab & Co. Inc.*, Disciplinary Proceeding No. 2011029760201 (Feb. 13, 2013), available at <http://www.finra.org/web/groups/industry/@ip/@enf/@ad/documents/industry/p210893.pdf>

⁵³ *Id.* at 9.

FAA’s mandate unless there is a clear expression of *congressional* intent to carve out an exception to the FAA.”⁵⁴

D. Continued FAA Preemption

The U.S. Supreme Court has adhered to its broad interpretation of the FAA, issuing three additional FAA preemption decisions in its 2011–12 term, which impact both state and federal law. *Marmet Health Care Center, Inc. v. Brown*⁵⁵ ruled that the FAA preempted a West Virginia Supreme Court of Appeals’ rule that voided, as against public policy, pre-dispute arbitration clauses in nursing home contracts with respect to negligence claims.⁵⁶ The state rule invalidating arbitration clauses in *Marmet* “singled out” arbitration in direct conflict with the FAA.⁵⁷

In *Nitro-Lift Technologies, LLC v. Howard*,⁵⁸ the Court held that the FAA’s enforcement provision preempted the state law invalidating non-competition agreements in employment contracts as contrary to public policy.⁵⁹ The *Nitro* decision is consistent with the separability doctrine of *Buckeye Check Cashing*, holding that the FAA, not state law, governs the enforceability of an arbitration clause (severable) from an employment contract containing a non-competition provision.⁶⁰ Thus, the challenge must target the arbitration clause itself, as opposed to the contract as a whole. The Court rejected the Oklahoma State Supreme Court’s reasoning that the state’s statute specifically governing the validity of covenants not to compete must govern over the FAA, a more general statute favoring arbitration. Curiously, the Court addressed the “[a]ncient interpretive principle that the specific governs the general (*generalia specialibus non derogant*),” stating that this principle applies only “to conflict between laws of equal dignity . . . where a specific state statute conflicts with a general federal statute . . .,” the latter governs.⁶¹ Not only does this reading undermine specific state administrative procedures designed to address specialized areas, the Court broadly interpreted the FAA’s application over other federal statutes.

In considering the FAA’s interaction with respect to claims arising under the federal Credit Repair Organizations Act (CROA), which provides for a “right to sue,” *CompuCredit Corp. v. Greenwood*,⁶² held such claims arbitrable under the FAA and stated that CROA’s requirement that credit repair organizations notify consumers that

⁵⁴ *Id.* at 10 (emphasis in original).

⁵⁵ *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012).

⁵⁶ *Id.* at 1204.

⁵⁷ *Id.* See also *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (holding the FAA preempted the Montana law requiring conspicuous notice of arbitration provisions in contracts). Cf. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

⁵⁸ *Nitro-Lift Techs., LLC v. Howard*, 133 S. Ct. 500 (2012).

⁵⁹ *Id.* at 504. (“It is for the arbitrator to decide in the first instance whether the covenants not to compete are valid as a matter of applicable state law.”).

⁶⁰ *Id.* See also *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).

⁶¹ 133 S. Ct. at 504. (“[W]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.”) (citing *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 120, 1203 (2012) (quoting *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2012))).

⁶² *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012).

they “have a right to sue a credit repair organization that violates the Credit Repair Organization Act” does not reflect congressional intent to preclude arbitration of claims arising under the Act.⁶³

IV. CONTINUED CHALLENGES TO PREEMPTION

A. *State Schemes Weakened*

AT&T’s preemption ruling has reached beyond the supplanting of state laws invalidating class waiver clauses in arbitration contracts. There is a split in the California courts on whether the FAA preempts state private attorney general actions (PAGA), but the trend favors preemption.⁶⁴ In a PAGA action, private citizens are “deputized” as private attorney generals to bring representative actions as a means for public enforcement of the Labor Code. In *Brown v. Ralphs Grocery Co.*, the Court considered the PAGA claimant’s role as a proxy or agent of state labor law enforcement agencies, similar to the EEOC, not to be barred by an employee’s arbitration agreement to file suit under the federal anti-discrimination laws.⁶⁵ *Brown* stated that “*AT&T* does not purport to deal with the FAA’s possible preemption of contractual efforts to eliminate representative private attorney general actions to enforce the Labor Code.”⁶⁶ Yet, more recently, the same court ruled that the FAA does preempt PAGA actions.⁶⁷ A similar trend results in FAA preemption where class claims seek public injunctive relief under state law.⁶⁸

Applying *AT&T*’s decision to invalidate the Labor Code process in *Moreno* could also impact state administrative schemes, such as those provided in Fair Housing, Employment/Labor, Agriculture, and Worker’s Compensation laws. A state bar administrative scheme that provides for arbitration of attorney fee disputes before the state bar could also be at risk of preemption.

B. *FAA and Vindication of Federal Statutory Rights*

In its 2012–13 Term, the Court will address the question of whether the FAA’s mandate to enforce arbitration agreements as written (except, of course, if they purport to expand judicial review), applies where the enforcement would effectively deprive claimants of their ability to “vindicate” their federal statutory rights. The Supreme Court has repeatedly stated that arbitration is simply another forum for the resolution of

⁶³ *Id.* at 669.

⁶⁴ PAGA creates a statutory right for civil penalties for Labor Code violations that otherwise would be sought by state labor law enforcement agencies. *Cf. Brown v. Ralphs Grocery Co.*, 197 Cal. App. 4th 489, 500 (2011) (ruling that *AT&T* does not apply to PAGA claims); *Iskanian v. CLS Transp. Los Angeles*, 206 Cal. App. 4th 949 (Cal. Ct. App. 2012).

⁶⁵ *See Brown*, 197 Cal. App. 4th at 494.

⁶⁶ *Id.* at 500.

⁶⁷ *Cf. Brown v. Ralphs Grocery Co.*, 197 Cal. App. 4th 489 (2011).

⁶⁸ *Cf. Kilgore v. KeyBank, N.A.*, 673 F.3d 947 (9th Cir. 2012) (public injunctive relief claims preempted).

disputes, but by agreeing to arbitrate, parties do not forgo their substantive rights.⁶⁹ This argument was essentially rejected in *AT&T* with respect to the claims that class proceedings are necessary to prosecute small-dollar claims that otherwise would go unredressed. The Second Circuit Court of Appeals, however, has remained steadfast in refusing to enforce a class action waiver in the arbitration contract between merchants and American Express, where the practical effect of the enforcement of the waiver would bar plaintiffs from pursuing their statutory claims. Finding that plaintiffs could not effectively vindicate their rights due to the prohibitively high costs of individual arbitration, *In re American Express Merchants' Litigation*⁷⁰ ruled that *AT&T* did not compel enforcement of the class waiver.⁷¹ The Second Circuit stated that *AT&T* “[p]lainly offers a path for analyzing whether a state contract law is preempted by the FAA.”⁷² Its holding, by contrast, rested squarely on “[a] vindication of statutory rights analysis”⁷³

The vindication of statutory rights concern has similarly guided other courts in denying enforcement of class waivers. The Second Circuit in *Chen-Oster v. Goldman, Sachs & Co.*,⁷⁴ denied enforcement where the plaintiff’s Title VII federal statutory pattern and practice discrimination claim could only be pursued on a class basis.⁷⁵ A similar rationale applied to preclude the contractual waiver of class claims under the Fair Labor Standards Act (FLSA).⁷⁶ Pending review before the Fifth Circuit Court of Appeals, the National Labor Relations Board decision in *D.R. Horton Inc. v. Cuda*,⁷⁷ ruled that employers violate Section 7 of the National Labor Relations Act, which provides workers the right to engage in concerted action for mutual aid or protection, when they require, as a condition of employment, an employee to sign an agreement foreclosing class action claims and requiring all disputes with the employer to be decided in binding arbitration.⁷⁸

⁶⁹ See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (citation omitted).

⁷⁰ *In re Am. Express Merchants' Litig.*, 667 F.3d 204 (2nd. Cir. 2012), *cert. granted sub nom.* 133 S. Ct. 594 (2012).

⁷¹ *Id.* at 219.

⁷² *Id.* at 213.

⁷³ *Id.* Cf. *Pendergast v. Sprint Nextel Corp.*, 691 F.3d 1224 (11th Cir. 2012) (ruling that under *AT&T*, the court need not consider whether state law would invalidate a consumer arbitration contract class waiver as unconscionable and thus dismissing plaintiff’s class action lawsuit against defendant Sprint for alleged unlawful roaming fees and granting motion to compel arbitration. The court also refused to distinguish the case on the basis that the plaintiffs could get affidavits from consumer attorneys stating that they would refuse to take these \$20 cases in anything other than a class action).

⁷⁴ *Chen-Oster v. Goldman Sachs & Co.*, No. 10 Civ. 6950, 2011 WL 2671813 (S.D.N.Y. Jul 07, 2011).

⁷⁵ *Id.* at *4.

⁷⁶ See generally *Raniere v. Citigroup Inc.*, 827 F. Supp. 2d 294 (S.D.N.Y. 2011); *Sutherland v. Ernst & Young LLP*, 768 F. Supp. 2d 547, 551 (S.D.N.Y. (2011) (invalidating a class waiver in an employment agreement that would have precluded class litigation to enforce claims of the Fair Labor Standards Act (FLSA), finding that “[t]he record supports Sutherland’s argument that [pursuant to the Agreement] her maximum potential recovery would be too meager to justify the expenses required for the individual prosecution of her claim.”).

⁷⁷ *D.R. Horton Inc. v. Cuda*, 357 NLRB No. 184 (Case 12-CA-25764, Jan. 3, 2012).

⁷⁸ *Id.* at 1. See also Philip M. Berkowitz, *Developments in Arbitration of Employment Claims*, N.Y. L.J. (Jan. 12, 2012).

Owen v. Bristol Care, Inc.,⁷⁹ also involved an employee’s FLSA lawsuit seeking class certification while subject to an arbitration agreement that included a class action waiver. The Eighth Circuit did not find *D.R. Horton* consistent with *AT&T* or other circuit courts. It distinguished *D.R. Horton* on the basis that the *Bristol Care* employment agreement did not prohibit the employee from seeking redress with the EEOC, the NLRB, or other agencies. The court upheld the arbitration agreement, including its class action waiver.⁸⁰ In *Parisi v. Goldman Sachs & Co.*,⁸¹ the Second Circuit upheld a class waiver in an employment arbitration agreement, even though the plaintiff contended that arbitration on an individual basis would prevent her from pursuing “a pattern-or-practice claim” under Title VII of the Civil Rights Act of 1964.⁸² In so ruling, the Second Circuit stated—on a ground more pertinent to discrimination claims than to arbitration law—that “‘pattern-or-practice’ refers to a method of proof and does not constitute a ‘freestanding cause of action.’”⁸³

The Court emphasized the strong federal policy favoring arbitration, “even when the claims at issue are federal statutory claims, unless the FAA’s mandate has been ‘overridden by a contrary congressional command.’”⁸⁴ It added that “[e]ven claims arising under a statute designed to further important social policies may be arbitrated because ‘so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum,’ the statute will continue to serve both its remedial and deterrent function.”⁸⁵

The Court noted that it and other circuits have found two circumstances in which motions to compel arbitration must be denied because “arbitration would prevent plaintiffs from vindicating their statutory rights.”⁸⁶ First, as in *American Express*, the Second Circuit held that a class waiver was unenforceable because it would “effectively preclude” plaintiffs from bringing their antitrust claims.⁸⁷ Second, the Second Circuit recognized cases altering or invalidating arbitration agreements “where they interfered with the recovery of statutorily authorized damages” (e.g., where the arbitration clause restricted damages in a way contrary to a statute).⁸⁸

By contrast, the Second Circuit in *Bristol Care* determined that the arbitral forum would permit the plaintiff to prove her statutory claims, including by offering “evidence of discriminatory patterns, practices or policies.”⁸⁹ Interestingly, the Second Circuit issued its decision on March 21, 2013, after the oral arguments, but before the U.S. Supreme Court rules in *American Express* in June 2013.

Depending upon how the Supreme Court rules in *American Express*, the FAA’s preemptive force could displace not only state, but also federal law. Even if the Court

⁷⁹ *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013).

⁸⁰ *Id.* at 1053.

⁸¹ *Parisi v. Goldman Sachs & Co.*, No. 11-5529-cv (2d Cir. Mar. 21, 2013).

⁸² *Id.* at 3.

⁸³ *Id.*

⁸⁴ *Id.* at 5.

⁸⁵ *Id.* (emphasis in original) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991)).

⁸⁶ *Id.* at 3.

⁸⁷ *In re Am. Express Merchants’ Litig.*, 554 F.3d 300, 304 (2d Cir. 2009).

⁸⁸ *Parisi v. Goldman Sachs & Co.*, No. 11-5529-cv, at 3 (2d Cir. Mar. 21, 2013).

⁸⁹ *Id.* at 4.

were to uphold the Second Circuit's "vindication of rights" decision in *American Express*, it likely would apply only to federal rights, despite a similar concern for state rights. The potential exists for a discrepancy in enforcing arbitration agreements that displace state laws which, for example, regard class waivers as unconscionable or provide a process for administrative recourse of particular claims as *Moreno* did, yet allow vindication only for federal rights.⁹⁰ Either outcome makes little sense.

C. Legislative Attempts to "Reverse" FAA Preemption

Under the FAA preemption doctrine, states are largely inept to enact protective legislation. In response to considerable criticism of the enforcement of mandatory arbitration contracts in consumer, employment, and various commercial settings, Congress has enacted piecemeal legislation to address specific consumer protection and policy concerns.⁹¹ To preserve a state's ability to continue its traditional role to license and regulate the insurance industry, the McCann Ferguson Act reverses the presumption of FAA preemption in insurance contracts.⁹²

In response to the public outcry in *Jones v. Halliburton Co.*,⁹³ which enforced arbitration of a defense contractor's female employee's claim of sexual assault while in Iraq, Congress passed the "Franken Amendment," which bars many defense contractors and subcontractors from using pre-dispute arbitration agreements as a condition of employment. Similarly, the Dodd-Frank Consumer Reform and Wall Street Protection Act of 2010, invalidates pre-dispute agreements to arbitrate certain whistleblower claims brought against public companies and many financial services institutions. The proposed Arbitration Fairness Act of 2011 would invalidate pre-dispute agreements to arbitrate any kind of employment, consumer or civil rights matter.

As Professor Thomas Burch notes in his comprehensive study, over 139 arbitration reform bills have been introduced in Congress since 1995.⁹⁴ Clearly, the Supreme Court's FAA preemption doctrine is not working. A clear statement by Congress reinforcing the FAA's original purpose to enforce voluntary arbitration agreements, within the bounds of state and federal law, is warranted.

⁹⁰ See *Dean v. Draughons Junior Coll., Inc.*, __ F. Supp.2d __, 3:12-CV-0157, 2013 WL 173249, at *11 (M.D. Tenn. Jan. 16, 2013) (concluding state law that precluded enforcement of arbitration agreements if those hindered enforcement of state statutes, was preempted under *AT&T*); *Franco v. Arakelian Enterprises, Inc.*, 211 Cal. App. 4th 314 (2012) (concluding that arbitration enforcement is subject to arbitration being able to vindicate statutory claims effectively), *review granted and opinion superseded*, 294 P.3d 74 (Cal. 2013).

⁹¹ See, e.g., 10 U.S.C. 987(e)(3) (invalidating mandatory arbitration or waiver of rights in consumer credit contracts with military personnel); 7 U.S.C. § 197c(a)(b) ("Any action by or on behalf of a live poultry dealer with the intent or effect of limiting the ability of a poultry grower to opt out of the arbitration provision is an unlawful practice under the P&S Act) (giving farmers the choice to opt-out of arbitration in contracts involving livestock or poultry); 15 U.S.C. § 987(f)(4) (requiring written post-dispute consent to arbitration by all parties involving auto dealers).

⁹² 15 U.S.C. §1012 (2006).

⁹³ *Jones v. Halliburton Co.*, 583 F.3d 228 (5th Cir. 2009).

⁹⁴ Thomas V. Burch, *Regulating Mandatory Arbitration*, 2011 UTAH L. REV. 1309, 1355 (2011) (Appendix).

V. CONCLUSION

The rationale for determining that a private arbitration contract controls over a statutorily prescribed administrative agency review is certainly not evident in the 1925 Act. The FAA was hardly intended to displace an entire body of law that did not even exist at its enactment. Ironically, parties cannot agree to expand the scope of judicial review of their private dispute, but, by virtue of an agreement to arbitrate, can oust states from governance and even federal law not explicitly reversing the presumption of FAA arbitrability. And the courts are called to enforce such results.⁹⁵ The Supreme Court has “created an FAA monster”⁹⁶ in according it such vast preemption treatment, and impaired the ability of states to enact protective schemes. Absent a direct conflict or congressional intent to occupy the field, the interpretive principle that the specific govern over the general accords with constitutional, as opposed to FAA, preemption doctrine. The impact on state administrative schemes is particularly troubling, as these processes are generally designed to address power imbalances and to provide expeditious and accessible resolution of common disputes.

The impact of *AT&T* is not fully known and certainly evokes concern about the scope of its application. Just as *AT&T* may be the death knell of class actions, it appears to infect other areas of state legislation and governance.⁹⁷ The vast preemption doctrine causes unintended and unnecessary intrusion upon federalism and increasing piecemeal congressional legislation and proposals to “reverse” the misplaced reach of the FAA. It is past time for Congress to amend the FAA to explicitly define the statute’s intended reach and to restore the ability of parties to vindicate their rights and of government to govern.

⁹⁵ David S. Horton, *Arbitration as Delegation*, 86 N. Y. U. L. REV. 437, 441 (2011) (arguing that the Supreme Court’s interpretation is deeply flawed and “[a]llows private parties to engage in lawmaking”).

⁹⁶ David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 36 (1997).

⁹⁷ Courts could be potentially eliminated from the arbitration process altogether, other than at the judicial review stage, by a delegation provision. See *Rent-A-Center West, Inc. v. Jackson*, 120 S. Ct. 2772, 2780 (2010) (ruling 5-4, that where an arbitration provision delegates gateway questions concerning the validity and enforceability of the arbitration agreement (arbitrability) to arbitrators, unconscionability challenges must be directed to the delegation provision alone). Cf. *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 587-586 (2008) (holding that parties cannot by private contract agree to expand the scope of judicial review under the FAA).